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No. 94-1624

In The

Supreme Court of the United States

October Term, 1994

GORDON HAGER,

Petitioner,

vs.

LINDA LARGENT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a government official's claim of qualified immunity always operate as an absolute bar to all discovery pending a ruling on the immunity defense?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents agree with Petitioner's Statement of the Case except in following respects:

1. The United States District Court did not deny Petitioner's claim of qualified immunity and the Fifth Circuit Court of Appeals did not have jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The District Court ordered that Respondents could engage in very limited discovery (one deposition) prior to ruling on Petitioner's Motion for Summary Judgment based on qualified immunity. The Fifth Circuit Court of Appeals held that since "[t]he parties have presented two very different versions

of the events surrounding Poynor's death. . . . we agree with the district court that Hager's deposition is appropriate in order to resolve Hager's qualified immunity claim." (Petitioner's App. 8).

2. Petitioner fails to note that the witness Brian Blakely, whose deposition Respondents originally sought to take, was terminally ill. Rec. 206, 267, 319-320, 323.

SUMMARY OF THE ARGUMENT

The pretrial order of the District Court allows very limited discovery consisting of one deposition. Petitioner asserts his claim of qualified immunity should insulate him from all discovery. Respondents assert that although a pending defense of qualified immunity protects a public official from broad ranging and uncontrolled discovery, it is not in every case an absolute bar to all discovery. Given appropriate facts, limited discovery is not only allowed but required to enable the trial court to make a just decision. This is such a case.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's Decision Allowing Very Limited Discovery (One Deposition) Pending a Ruling on a Qualified Immunity Defense Does Not Conflict with Decisions of this Court.

Petitioner asserts that since he has filed a Motion for Summary Judgment claiming the defense of qualified immunity, he has an absolute right to a complete stay of

all discovery. Petitioner argues that under *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), an assertion of qualified immunity creates a bar to all discovery without regard to the facts of an individual case. Petitioner appears to argue that he is entitled to summary judgment, but that issue is not before the Court. Respondents respectfully suggest that Petitioner has confused the protection of summary judgment based on qualified immunity with the right to a stay from all discovery based on a claim of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court changed the test for qualified immunity from an inquiry into subjective bad faith to an objective determination of the legal reasonableness of the action. In changing the test, the Court was careful to limit the scope of the decision:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. . . .

Harlow, 457 U.S. at 819.

As Petitioner notes in his brief, the Supreme Court, in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97

L.Ed.2d 523 (1987), elaborated on the relationship between the qualified immunity defense and discovery:

> One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S. at 817, 73 L.Ed.2d 396, 102 S.Ct. 2727 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible state of a litigation. [citation omitted]

Anderson v. Creighton, 483 U.S. at 646 n.6 (Petition at 8).

Petitioner failed to complete the quote from *Anderson* which continues as follows:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. Cf. ibid. If they are not, and *if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved.* Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity. [emphasis added]

Anderson v. Creighton, 483 U.S. at 646-647 n.6.

In other words, this Court recognized that if the actions alleged by a Plaintiff were not actions that meet the *Harlow* reasonableness test and are different from the

actions that Defendant claims he took, then discovery must proceed before the issue of qualified immunity on summary judgment may be determined. Respondents respectfully suggest that *Anderson* clearly establishes that *Harlow* was not intended to and did not bar all discovery, but that discovery should be specifically "tailored" to the question of the qualified immunity.

Petitioner argues that this Court's decision in *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) has eliminated even narrowly tailored discovery in the context of a pending qualified immunity test. Respondents suggest that in *Siegert*, this Court clarified the priorities in analyzing a claim of qualified immunity, i.e., a court must first determine whether the plaintiff has alleged the violation of clearly established constitutional right. If the plaintiff's allegations do not meet this threshold inquiry, then the suit is to be dismissed without discovery. That analytical framework does not suggest that all discovery is barred in all cases pending the resolution of a qualified immunity defense.

Contrary to Petitioner's assertion, the Fifth Circuit's rulings are neither internally inconsistent nor in conflict with rulings of this Court. The Fifth Circuit's holdings are and have been consistent with the *Siegert* framework of making the threshold inquiry that of whether the plaintiff has alleged the violation of a clearly established constitutional right. *See Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986) ("Stripped of its conclusory allegations and the technical buzz words liberally sprinkled throughout, the plaintiff's pleadings allege, at best, a negligence action. Recently, the Supreme Court specifically held that a Sec. 1983 civil rights claim cannot be based on a negligent

failure to protect."); *Elliott v. Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985) ("In view of the purposes of the immunity defense, as declared by the Supreme Court and this Court, we conclude that allowing broadly-worded complaints, such as those of the plaintiffs here, which leaves to traditional pretrial depositions, interrogatories, and requests for admission the development of the real facts underlying the claim, effectively eviscerates important functions and protections of official immunity.")

The Fifth Circuit opinions are also consistent with the *Harlow* and *Anderson* mandates that discovery, if allowed, be appropriately limited in questions of qualified immunity. *See, e.g., Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir. 1991) ("If the court had carefully tailored its order to allow the parties to only uncover those facts necessary to rule on Davis' immunity defense, we would not have jurisdiction to rule on the order at this time.") The Fifth Circuit has limited discovery in the context of the immunity question to cases involving fact questions that need clarification before the district court can fairly rule on the immunity issue. *See Geter v. Fortenberry*, 849 F.2d 1550, 1560 (5th Cir. 1988) ("[N]either we nor the district court can rule on his immunity defense until the factual dispute concerning his identification tactics is resolved.") In *Lion Boulos v. Wilson*, 834 F.2d 504 (5th Cir. 1987), the Fifth Circuit identified this class of cases:

> *Harlow, Mitchell* and *Jacquez* make clear that qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad. Discovery designed to flesh out the merits of a plaintiff's claim before a ruling on

> the immunity defense or discovery permitted in cases where the defendant is clearly entitled to immunity would certainly fall within this category. Immediate appeal would lie from these orders because *Mitchell, Harlow* and *Jacquez* require that immune defendants be exempt from avoidable, burdensome pretrial matters.
>
> However, a second class of discovery permitted before a ruling on a defendant's motion to dismiss does not encroach upon his qualified immunity claim. Discovery orders entered when the defendant's immunity claim turns at least partially on a factual question; when the district court is unable to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable nor overly broad. Such orders are not immediately appealable. . . .

Lion Boulos, 834 F.2d at 507-508.

Other circuits have adopted this rationale. *See, e.g., Maxey by Maxey v. Fulton*, 890 F.2d 279 (10th Cir. 1989). *See also, Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987). Petitioner's analysis of the cases cited ignores the facts of the individual cases and often the holdings. Petitioner, for example, recites that it was the Fifth Circuit's "reliance upon *Gaines* and *Lion Boulos*, rather than following *Siegert* that necessitates this petition." (Petition at 10). In *Gaines v. Davis*, 928 F.2d 705 (5th Cir. 1991), the Court held the district court's discovery order was overly broad under *Harlow* and reversed and remanded. Only if *Siegert* is read to create an absolute bar to all discovery in all cases involving the defense of qualified immunity is there any

inconsistency between the holdings of the Fifth Circuit and those of this Court.

II. The Assertion of a Defense of Qualified Immunity Should Not Bar All Discovery in Cases Involving Factual Disputes as to the Actions of the Government Official.

In the case before the Court, Respondents have alleged that Petitioner used excessive force by administering gun shot wounds to Stanley Poynor which resulted in Poynor's death. Indeed, in considering the use of excessive force it is difficult to imagine any force more excessive than multiple gun shot wounds administered at point blank range. The events surrounding the Petitioner's actions are disputed. As the Fifth Circuit stated, "the parties have presented two very different versions of the events surrounding Poynor's death. . . . " (Petitioner's App. 8). The Fifth Circuit held that Respondents have alleged the violation of a clearly established constitutional right and that limited discovery, i.e. the one deposition of Petitioner, is appropriate to resolve the Petitioner's qualified immunity claim. (Petitioner's App. 8). Respondents have unquestionably alleged the violation of a clearly established constitutional right. *See Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). The order allowing one deposition is not "broad ranging" or "uncontrolled" discovery. It will constitute the only discovery by Respondents thus far and it will serve justice by allowing some exploration of the inconsistencies and contradictions in the affidavits on which Petitioner relies to support his motion for summary judgment.

Harlow requires an objective determination of the legal reasonableness of the public official's actions. However, when there is a factual dispute as to the actions and not just the reasonableness of the actions, it follows that some discovery may be necessary before the Harlow test can be applied.

> We caution that, despite the rule we announce today, many denials of claimed immunity in pretrial proceedings will not be in a posture for appellate review, in that entitlement to immunity will turn on disputed questions of fact or will otherwise be inextricably bound up with the merits of the claims. While *Harlow* made easier the pretrial resolution of immunity claims by its elimination of the subjective prong of good faith, there remain many cases where such early decisions cannot be made.

Williams v. Collins, 728 F.2d 721, 728 n.7 (5th Cir. 1984). This was also noted in *Anderson*, 483 U.S. at 646-647 n.6. To allow limited discovery is not a denial of the official's potential right to summary judgment based on qualified immunity. Indeed, to the extent discovery will assist the official in explaining prior inconsistences and/or contradictions, it may aid an official's quest for summary judgment. On the other hand, it may aid a plaintiff against an official who stonewalls and attempts to hide behind a summary judgment affidavit and a claim of qualified immunity. This Court has recognized the policy concerns with immunity defenses. "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813-814. This Court has also declined to extend the defense of absolute immunity. *See Harlow*, 457 U.S. 800;

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). In the face of disputed facts, this Court should not extend an absolute shield from any discovery based on a claim of qualified immunity. Such an absolute shield would deprive the trial courts of all discretion and undoubtedly lead to manifest injustice in many cases.

CONCLUSION

Respondents pray that this Court deny Gordon Hager's Petition for Writ of Certiorari because the case presents no issue appropriate for this Court's review and because the lower courts' holdings are not in error.

Respectfully submitted,

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